November 14, 2002

D.T.E. 01-78 (Phase II)

Petition of Boston Edison Company d/b/a NSTAR Electric for approval of its 2001 Transition Charge True-Up, pursuant to G.L. c.164, § 1A(a), 220 C.M.R. § 11.03(4) and the Restructuring Settlement Agreement approved by the Department of Telecommunications and Energy in D.P.U./D.T.E. 96-23.

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ORDER ON OFFER OF SETTLEMENT

I. INTRODUCTION

On December 3, 2001, pursuant to G.L. c.164, § 1A(a), 220 C.M.R. § 11.03(4) and the Restructuring Settlement Agreement approved in Boston Edison Company, D.P.U./D.T.E. 96-23 (1998), Boston Edison Company d/b/a NSTAR Electric ("BECo" or "Company") filed with the Department of Telecommunications and Energy ("Department") its 2001 reconciliation filing that included reconciliation of transition, transmission, standard offer and default service costs and revenues and proposed updated charges and tariffs to be effective January 1, 2002 ("Reconciliation Filing"). On December 14, 2002, after notice duly issued, the Attorney General of the Commonwealth ("Attorney General") and Northeast Energy Associates, L.P. ("NEA") filed comments on the Reconciliation Filing. On December 27, 2001, the Department approved BECo's tariffs to take effect on January 1, 2002, subject to further investigation and reconciliation. Boston Edison Company, D.T.E. 01-78 (2001).[1]

The Department conducted a public hearing and procedural conference on January 30, 2002. The Attorney General filed notice of intervention pursuant to G.L. c. 12, § 21E. NEA was allowed to participate as a limited participant in this proceeding. On May 29, 2002, the Department granted the joint motion of the Company and Attorney General to defer

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[1] The Department also allowed a Standard Offer Service Fuel Adjustment of $0.01426 per kilowatt hour for electricity consumed on and after January 1, 2002 through March 31, 2002. D.T.E. 01-78, at 4.

evidentiary hearings to allow more time to negotiate a settlement.[2] On October 7, 2002, the Company and Attorney General (together, "Parties") filed:

(1) a Joint Motion for Approval of Settlement Agreement ("Joint Motion"); and (2) a Settlement Agreement ("Settlement") that purported to resolve all issues related to this proceeding. On October 18, 2002, the Company responded to two Department information requests. On November 1, 2002, the Parties amended the Settlement and Joint Motion to request approval of the Settlement on or before November 18, 2002.[3,4] No comments were filed on the Settlement.

II. THE SETTLEMENT

The Settlement states that it resolves all issues relating to the reconciliation of costs and revenues for the calendar year 2001 ("reconciliation period") (Settlement at 2, § 1.5; Joint Motion at 1). The Settlement establishes a reconciliation of costs and revenues for the reconciliation period (id. § 2.1; Exhs. BEC-BKR-1 (Settlement); BEC-BKR-2 (Settlement) BEC-RAP-1 (Settlement); BEC-BKR-3 (Supp); IR-DTE-4-2). The Settlement states that it

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[2] Hearings were re-scheduled for June 14, 2002. On June 12, 2002, the Department granted a subsequent joint motion to defer evidentiary hearings.

[3] The Joint Motion also requests that the Department enter into evidence: (1) 23 Company exhibits; (2) three Settlement exhibits; (3) 31 Company responses to Department information requests; and (4) 30 Company responses to Attorney General information requests (Settlement, App. A). The Department grants this motion.

[4] On its own motion, the Department moves into the record of this proceeding the Company's responses to IR-DTE-4-1 and IR-DTE-4-2, filed October 18, 2002. In addition, the Department incorporates by reference into this proceeding BECo's Restructuring Settlement Agreement approved in D.P.U./D.T.E. 96-23. 220 C.M.R. § 1.10(3).

corrects an error in the calculation of the securitization reconciliation (id. at 2, § 2.2, citing Exh. AG-IR-1-9 [errata] (July 11, 2002)).[5] The Company explained that the error in its securitization true-up was due to its failure to apply the method specified and approved in Boston Edison Company, D.T.E. 98-118 (1999), and in the routine securitization true-up letters filed with the Department (Exhs. DTE-IR-4-1, citing D.T.E. 98-118, at 9-11, 54, App. 1, at 27; AG-IR-1-6).[6] In addition, the Settlement provides some minor updates to booked accounts (Settlement at 2, § 2.2, App. B.; Exhs. BEC-BKR-1 (Settlement); BEC-BKR-2 (Settlement); BEC-RAP-1 (Settlement); IR-DTE-4-2). See D.T.E. 98-118. The Company states that G.L. c. 164, D.T.E. 98-118, and the relevant bond indenture do not prohibit the Department from approving an adjustment to the transition charge that corrects an error in that calculation relating to securitization (Settlement at 2, § 2.2, n. 1, App. B).

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5 The Company stated that it committed an error in its securitization true-up that reconciles the amount received by the securitization fund from the transition payments as reflected in the routine true-up letters filed with the Department pursuant to D.T.E. 98-118 (AG-IR-1-9 [errata], citing Revised Exh. BEC-BKR-2 (Supp) at 6, AG-IR-1-6). The correction to this error is shown in Revised Exhibit BEC-BKR-2 (Supp) at 6, which is the same as Exhibit BEC-BKR-2 (Settlement) at 6.

6 The corrected schedule provides annual gross-up of securitization collections at a rate of 0.67 percent, as specified in the routine true-up letters filed with the Department, resulting in additional amounts of $331,000, $772,000, and $747,000 for 1999, 2000, and 2001, respectively (Exhs. BEC-BKR-2 (Settlement) at 6; AG-IR-1-9 [errata], Att. 1; BEC-BKR-2 (Rev.) (Supp) at 6; AG-IR-1-6).

The Settlement states that the Parties have not agreed on the issue of whether transmission revenues received from wholesale transactions have been properly accounted for in the computation of the retail revenue requirement for Local Network Service (id. at 2, § 2.3; Exh. BEC-BRK-3 (Supp.)). The Parties agree that BECo shall mitigate, to the maximum extent practicable, the costs incurred in relation to the purchased power agreement with Hydro Quebec, and report the results of those mitigation activities in its next reconciliation filing (Settlement at 3, § 2.4; Exhs. BEC-RAP-1 (Settlement), at 5, l. 9-10; BEC-BRK-1 (Settlement), line 3, column B).

In addition, the Settlement states that, other than where expressly stated, the Settlement: (1) shall not constitute an admission by any party that any allegation or contention in this proceeding is true or false; and (2) shall not in any respect constitute a determination by the Department as to the merits of any issue raised during the proceedings (id. at 4, § 3.1). The Settlement also states that it establishes no principles and, except as to those issues resolved by approval of this Settlement, shall not foreclose any party from making any contention in any future proceedings (id. at 4, § 3.2).

The Settlement provides that the content of Settlement negotiations (including work papers and documents produced in connection with the Settlement) shall be confidential (id. at 4, § 3.3). The Settlement also states that all offers of settlement are without prejudice to the position of any party or participant presenting such offer (id.). The Settlement provides that the content of Settlement negotiations are not to be used in any manner with these or other proceedings involving Parties to this Settlement (id.).

Should the Department not approve the Settlement in its entirety by November 18, 2002, the Settlement provides that it shall be deemed withdrawn and not constitute any part of the record in this proceeding or be used for any other purpose (id. at 5, § 3.5).

III. STANDARD OF REVIEW

In assessing the reasonableness of an offer of settlement, the Department reviews the entire record as presented in a company's filing and other record evidence to ensure that the settlement is consistent with applicable law, including relevant provisions of the Restructuring Act, Department precedent, and the public interest. Boston Edison Company, D.P.U./D.T.E. 96-23, at 13 (1998); Berkshire Gas Company, D.P.U. 96-92, at 8 (1996); Boston Gas Company, D.P.U. 96-50, at 7 (Phase I) (1996). A settlement among the parties does not relieve the Department of its statutory obligation to conclude its investigation with a finding that a just and reasonable outcome will result. Essex County Gas Company, D.P.U. 96-70, at 5-6 (1996); Fall River Gas Company, D.P.U. 96-60, at 5 (1996).

IV. ANALYSIS AND FINDINGS

The Department notes that the Company's proposed correction to its securitization true-up (Exh. AG-IR-1-9 [errata], Attachment 1- Revised Exhibit BEC-BKR-2 (Supp) at 6), is consistent with D.T.E. 98-118, and the routine true-up letters filed by the Company with the Department pursuant to D.T.E. 98-118.[7] This corrected schedule is the same schedule shown

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[7] In addition to the issuance advice letter filed with the Department on July 28, 1999 relating to the issuance of rate reduction bonds approved in D.T.E. 98-118, the Company also has filed routine true-up letters with the Department for 2000, 2001, and 2002 on March 13, 2000, March 15, 2001, and March 15, 2002 (Exh. AG-IR-1-6).

in Exhibit BEC-BKR-2 (Settlement) at 6. In addition, the Department notes that the minor changes in booked amounts proposed in the Settlement correct for the amounts BECo actually realized during the reconciliation period (Exh. DTE-IR-4-2).

Upon review of the entire record in this proceeding, the Department finds that, on balance, the Settlement represents a reasonable resolution of the issues in this proceeding. The Department finds that the Settlement's method of reconciling costs and revenues is consistent with the Restructuring Settlement and Department precedent. Moreover, the Settlement's method of reconciling costs and revenues substantially complies with the Restructuring Act and in the public interest. Therefore, the Department approves the Settlement.[8]

Our approval of the Settlement relies in part on the stipulation by the Parties of the amount of revenues and costs only for the year 2001 (Settlement at 2, § 2.1, citing Exhs. BEC-BKR-1 (Settlement), BEC-BKR-2 (Settlement) and BEC-RAP-1 (Settlement)). The Settlement does not preclude the Department from investigating the level of the Company's transition costs for the purpose of determining the Company's mitigation incentive in 2002 and future years (Restructuring Settlement at 239, 244). G.L. c. 164, § 1G(d)(1); 220 C.M.R. § 11.03(3)(a)(6); Standard Offer Fuel Adjustments, D.T.E. 00-70-A, Letter Order (June 29,

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[8] The Department disallows the Settlement's claim of evidentiary privilege set out at page 4, § 3.3. The claims are identical to the settlement provisions the Department disallowed in Boston Edison Company, D.T.E. 00-82 (Phase II), at 9, n.12 (2001) and Boston Edison Company, D.T.E. 99-107 (Phase II), at 11 n.12 (2000). See Massachusetts Electric Company/Eastern Edison Company, D.T.E. 99-47, at 71-74 (2000).

2001); Boston Edison Company, D.P.U./D.T.E. 97-95, at 94-95 (2001).[9] In particular, the Settlement does not address whether revenues collected from the standard offer service fuel adjustment and applied to reduce the Company's transition costs, pursuant to the settlement approved in D.T.E. 98-111-A, constitute mitigation of such costs.

V. ORDER

Accordingly, after due notice, hearing and consideration, it is

ORDERED: That the Joint Motion to Approve an Offer of Settlement and Settlement Agreement, submitted by Boston Edison Company and the Attorney General on October 7, 2002, be and hereby is ALLOWED; and it is

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[9] In D.P.U./D.T.E. 97-95, the Department directed BECo to return to ratepayers the carrying charge of BECo's overinvestment in Boston Edison Technology Group in the form of a credit to the Company's transition costs. The Department specified that the credit shall not be eligible for the purpose of determining the transition charge mitigation incentive as provided for in the Company's Restructuring Settlement. Id. at 95.

FURTHER ORDERED: That Boston Edison Company follow all other directives in this Order.

By Order of the Department,

Paul Vasington, Chairman

James Connelly, Commissioner

W. Robert Keating, Commissioner

Eugene J. Sullivan, Jr., Commissioner

Deirdre Manning, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part. Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).

D.T.E. 01-78 (Phase 1)

Concurrence of James Connelly, Commissioner

I concur in the majority's allowance of the Joint Motion for Approval of Settlement Agreement, filed 7 October 2002. I do not, however, agree with the statement found at page 6, footnote 8, to the effect that the Settlement Agreement, at page 4, § 3.3, sets out "a claim of evidentiary privilege." It does not.

The term "privilege" is a term of art. It has precise meaning and consequence in the law. The Department itself has long insisted that parties scrupulously use the term and not confuse it with judicially recognized policy reasons that can exclude evidence of compromise or settlement negotiations from judicial or Department proceedings. See Boston Gas Company, D.P.U. 88-67 (Phase I), at 15-25 (1988). Footnote 8, sad to say, disregards the Department's own clear precedent: Boston Gas Company, D.P.U. 88-67, carefully distinguishes evidentiary privilege from other grounds on which evidence might be ruled incompetent in Department proceedings.

Moreover, the words of § 3.3 of the Settlement Agreement are quite plain. Even a cursory reading of § 3.3 discloses that the Joint Movants have made no claim whatsoever of evidentiary *privilege*. The term does not appear in the Settlement Agreement. And so, *pace* the majority's statement, there is patently no asserted "claim of evidentiary privilege" to be disallowed. The Joint Movants' statements evidently relate to the procedures set out in Boston Gas Company, D.P.U. 88-67, at 24.

Administrative law, to be sure, takes a more relaxed view of the rules of evidence than does the judiciary. But the Administrative Procedure Act is, nevertheless, at some pains to distinguish "privilege" from other evidentiary rules. G.L. c. 30A, § 11(2). It is a distinction worth preserving in Department practice.

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James Connelly, Commissioner